PRECIS AND COMMENT

SUBJECT: LRH 10 Oct. 1972 Memorandum to DCI Regarding Protection of Classified Information

1. 4 possibilities suggested:

a. Rewrite contract of employment assigning income from speeches or publications.

b. Amend CIA Retirement Act so that annuity is forfeited if DCI determines secrecy agreement has been violated.

c. "Intelligence Data" legislation

d. Amend Scarbeck statute making it a crime to reveal classified information to any unauthorized person.

2. Assignment of Income -- This has appeal because it is based on contract law as applied to the Agency and the Agency has had success in this regard in the Marchetti case; and, as LRH points out, it may discourage the current willingness to divulge secrets for financial gain. No legislation would be required. Draw backs are that it would be only an effective deterrent when income is involved. Aside from its effect as a deterrent, the assignment itself would not stop harmful unauthorized disclosures. Further, the determination on clearing the publication rests with the Director which suggests that the Director is in a position to impose his will on what is to be published. From the outside, this may not appear to be a responsible assumption of power.

3. Forfeiture of Annuity -- (See attachment A for detailed pro's and con's.) This proposal requires legislation and has only limited application. If we are going to pay the price, let's get a whole loaf; such as, "Intelligence Data" or Scarbeck legislation. NOTE: Ed Braswell sees due process problems.

ADMINISTRATIVE-INTERNAL USE ONLY

10 October 1972

MEMORANDUM FOR THE RECORD

SUBJECT: Proposal for Annuity Forfeiture Upon Determination By the Director That a Participant Has Violated Secrecy Agreement

Arguments for the Proposal:

1. Policy. Policymakers want tighter laws to prevent unauthorized disclosures. Any related proposal, having reasonable survivability prospects in the legislative process, should be pushed.

2. Obligations of Law. Consistent with the Director's responsibility for "protecting intelligence sources and methods" he should take the lead in pushing any reasonable proposal giving him additional leverage in fulfilling that responsibility. Under current authority the Director can terminate an employee, but he has no comparable leverage once retirement benefits vest. Obviously, in any one case a retired employee can do just as much or more damage to intelligence sources and methods.

3. Statutory Precedent. Statutory precedent exists: 5USCA 8311 to 8313 and P. L. 88-643, section 234(a).

4. Minimum Repercussions. The proposition involving as it does an amendment to the 1964 CIA Retirement Act is unlikely to prompt floor amendments aimed at the Director's authorities in the 1947 and 1949 Acts.

5. Court Decisions. The proposition is a logical statutory extension of the Marchetti case decision by denying benefits to one who has breached a condition of employment.

6. Congressional Climate. The 93rd Congress may be so constituted that it will present an unique opportunity for obtaining favorable action on this or similar proposals.

ADMINISTRATIVE-INTERNAL USE ONLY

Arguments Against the Proposal:

1. Public Reaction. Regardless of its merits, the proposition will most likely generate strong public reaction that the Agency and/or the Administration is applying the screws to CIA employees for a number of nefarious reasons, e.g., to avoid embarrassment to Administration policies, to attempt to influence the judgment of the objectivity and integrity of CIA employees, etc.

2. History. The legislative precedent for the proposition was born in a period of American history which many people still view with emotion. This will tend to support misunderstanding of the proposition regardless of its merit.

3. Limited Effect. The CIA Retirement Act applies to only one-third of the work force. The other two-thirds are also exposed to highly sensitive information and are signatories to secrecy agreements, but would not be subject to the proposed sanctions (an interesting side effect of this disparity is to provide further support for extending the CIA Retirement Act to all employees).

4. Lack of Specific Precedent. The general law which applies to all Federal staff retirement systems, including CIA's, provides for the forfeiture of retirement benefits for, among other things, a conviction arising out of "disclosure of classified information". The proposal provides for such forfeiture on a unilateral determination by the Director. The obvious point is why is existing law not sufficient and what justifies resort to administrative fiat.

5. Due Process--Justiciability. In the 93rd Congress we will be facing Senator Ervin and others who apparently have sincere difficulty in appreciating why we are placed at a disadvantage in court cases. Clearly, since the proposal does not provide for appeal and is not on its face justiciable, we should expect a strong fight from Senator Ervin and others.

6. General Applicability. If the proposition has validity, it should apply to all Federal employees who sign secrecy agreements and should, therefore, conform to the process and other requirements that now appear in the comparable sections of Title 5. It should apply to all Federal staff retirement systems.

7. Half a Loaf. The principal purpose to be served by the proposal is to deter the unauthorized disclosure of classified information. Yet it has only limited application. If we are going to step in the breach, weather the storm of public/congressional reaction, and use up our credit in a number of our Hill accounts, shouldn't we go all out and attempt to get an enactment such as the intelligence data proposal, which is going to be worth the price.

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Assistant Legislative Counsel

Distribution:
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1 - Mr. Warner
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3. Forfeiture of Annuity -- (See attachment A for detailed pro's and con's.) This proposal requires legislation and has only limited application. If we are going to pay the price, let's get a whole loaf; such as, "Intelligence Data" or Scarbeck legislation. NOTE: Ed Braswell sees due process problems.

4. "Intelligence Data" Legislation -- This is probably the best of all of the proposals. The problem is to define the term with sufficient specificity (probably by locking it into "intelligence sources and methods") to justify the fact that (1) the propriety of affixing the classification is not a matter for jury determination and (2) there is no need to prove intent to harm the U.S. Government or benefit a foreign government. Precedent for this legislation is found in 18 U.S.C. 798(a) (COMINT) and 42 U.S.C. 2227 (Restricted Data). The legislation could also include authority for injunction proceedings similar to that found in the Atomic Energy Act (42 U.S.C. 2280) upon a showing that a person has engaged or is about to engage in a proscribed activity.

5. Broadening Scarbeck Statute -- This has the same advantages as the "intelligence data" legislation. The problem is that the Scarbeck statute standard involves any classified information. Currently, it is a crime only if the "classified information" is passed to an agent of a foreign government or a Communist front organization. The proposal would make it a crime to pass classified information to any unauthorized person such as a newspaper man and the recipient himself on the basis of this crime could be subject to prosecution under misprision of felony or conspiracy

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statutes. The Commission on the revision of the Criminal Code has already reacted negatively to this recommendation. Since an authorized recipient is a determination to be made within the Executive Branch under the authority of the President, one can see the likelihood of charges that such a statute would be used politically.

6. Strategy -- With respect to both four and five above, LRH recognizes their serious policy and political implications and believes our prospects for success are better if we work through the revision of the Federal Criminal Code. This may be too limiting. It is quite likely that that revision will drag out over a number of Congresses. Perhaps the makeup of the upcoming Congress will be favorable towards legislation seeking to tighten up in the area of protecting classified information. It is quite possible that the Armed Services Committee would look favorable upon "intelligence data" amendment to the CIA Act of 1949 or to the National Security Act of 1947. It is recognized that there is concern that any amendment to those Acts may carry over into other provisions. While this may be a risk it is a risk that can be assessed and at least in the House can be avoided through the use of a "closed rule" when the matter comes to the floor. Also the Scarbeck statute is a part of the Internal Security Act of 1950 which in the House falls under the jurisdiction of Ichord's Internal Security Committee and Eastland's Internal Security

Subcommittee in the Senate. Both of these Committees are considered to be favorable forums for such legislation. In summary, the Judiciary Committees of both Houses do not have a jurisdictional lock on the legislation, seeking the improvements through the general revision of the Federal Criminal Code most likely will be a long drawn-out process, and there are other alternatives which ought not to be dismissed at this time.

OGC 72-1487

10 October 1972

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: Protection of Classified Information

1. This memorandum is for information only.

2. This is a status report on our efforts to improve protection of classified information. This has been a matter of continuing study over the years, and at the present time we are concentrating on three possible courses of action.

3. The first is administrative in nature and needs no legislation. This would add a new condition to the contract of employment by which an agent or employee would assign to the Agency all royalties, fees, or other income derived from books, speeches, or other publications on the subject of intelligence. In the event of a publication which had not been cleared by the Agency, we would pursue any such income on a contract basis if the publication contained any classified material. If the publication had been cleared or if we in our sole judgment decide that it does not contain any classified information, we would release the assignment as to that particular publication to the author. Hopefully, this would discourage the current willingness to divulge Government secrets for financial gain. This was proposed by OGC several years back but on review at the Deputies' level was thought to be undesirable as a matter of policy. On review in the light of current events, we are actually writing such a provision in new contracts of [redacted] although we may have to make some revisions as we study further the rather complex

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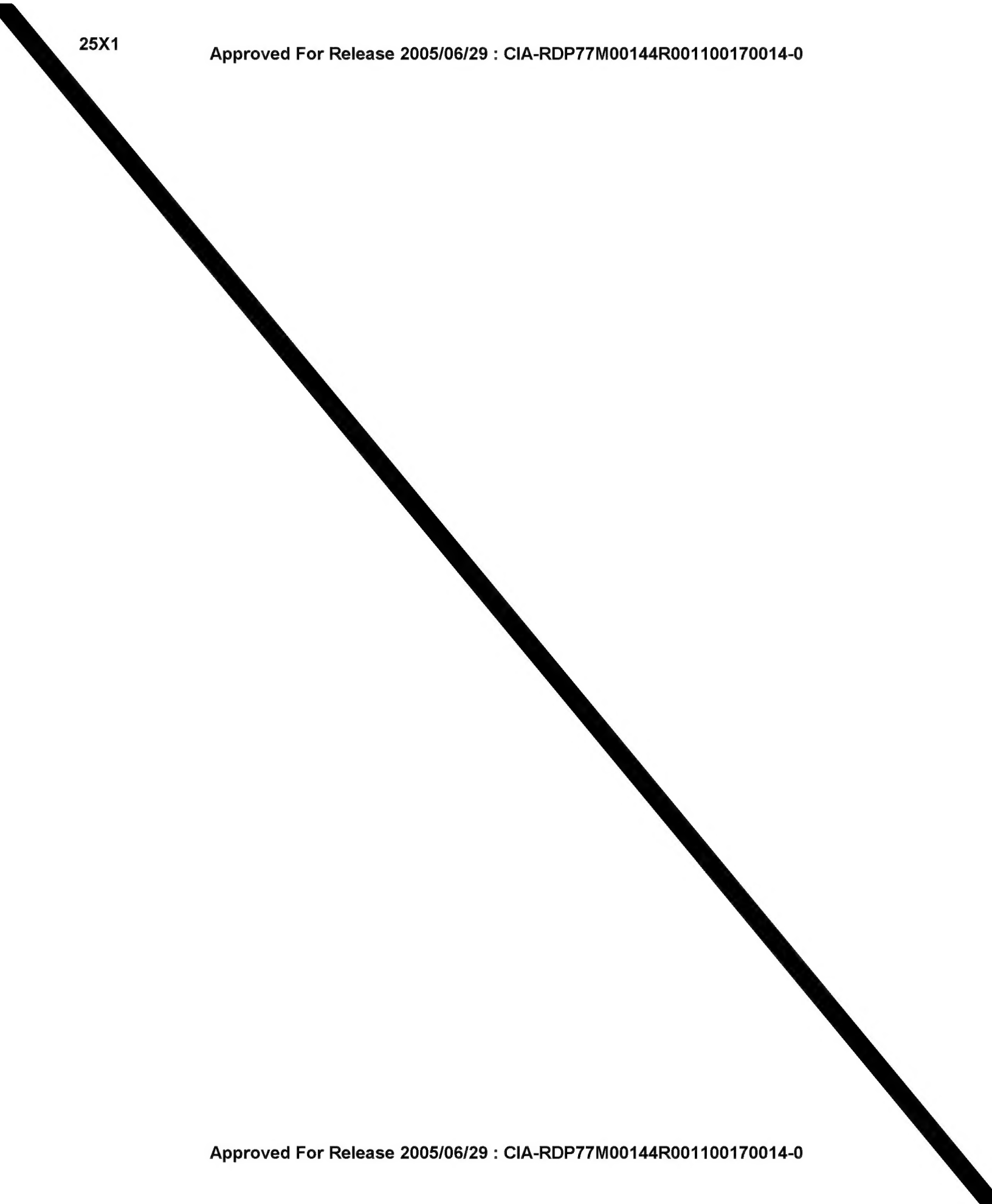
legal implications. We are considering requiring such an assignment by most other employees and agents. We have also been considering the assignment of the actual property rights of published material, but at the moment I am of the opinion that this runs straight into the First Amendment. We will discuss this further with the Department of Justice.

4. The second is also administrative in nature but would require legislation. This would be a provision that any retiree who violated his secrecy agreement would thereby forfeit any further retirement pension, subject only to refund of his contribution to the retirement fund. There is a precedent for this which you may recall in connection with the Alger Hiss case. He finally took his case to court and it was held that the suspension of his retirement rights was not applicable to him on the grounds that the statute was ex post facto, but the courts did not invalidate the statute itself. It would, of course, be preferable to have such a penalty apply to retirees under either the Civil Service or the CIA retirement systems, but we may find it feasible only to seek such legislation for the CIA system. This is a new idea and will take considerable coordination in the executive branch before any formal presentation to the Congress. I see no reason, however, why we should not discuss it at an early opportunity with our own congressional subcommittees.

5. The third course of action has to do with revisions and amendments of the Federal Criminal Code. Here the situation is more complicated as there has been underway for some time a study for the over-all revision of the entire Criminal Code. The National Commission on Reform of Federal Criminal Laws, which was created by statute, has finished its work and submitted it to the President. We did considerable work with this group in the drafting stages. The President has now directed the Department of Justice to set up a task unit to consider the report and come up with a final legislative proposal. We are continuing to work with the Justice officials on this task unit. There are two aspects of this effort:

a. The first is to make sure that nothing in the revision will weaken or lose any of the criminal sanctions in the existing legislation. (As an example,



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